

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

RECEIVED

APR 24 2000

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Amendment of Part 90 of the) PR Docket No. 93-144
Commission's Rules to Facilitate)
Future Development of SMR Systems)
In the 800 MHz Frequency Band)

To: The Commission

OPPOSITION TO PETITION FOR RECONSIDERATION

Pursuant to Section 1.429 of the Rules of the Federal Communications Commission ("Commission"), Nextel Communications, Inc. ("Nextel") respectfully submits this opposition to Chadmoore Wireless Group, Inc.'s ("Chadmoore") Petition for Reconsideration (the "Petition") of the Commission's Fresno Remand Order in the above captioned proceeding.¹ The Commission should dismiss Chadmoore's Petition because Chadmoore lacks standing, the Petition is untimely and it raises no new issues.

I. BACKGROUND

Chadmoore's Petition is another attempt to protest the Commission's denial in May 1997 of certain requests for wide-area extended implementation ("EI") authority. Chadmoore's own request for EI authority

¹ In the Matter of Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, Memorandum Opinion and Order on Remand, 14 FCC Rcd 21679 (1999) (the "Fresno Remand Order").

No. of Copies rec'd 4
List ABCDE

was denied by the Commission in 1995.² Here, Chadmoore seeks reinstatement of approximately 500 Specialized Mobile Radio ("SMR") licenses formally held by the Roberts License Group ("Roberts") that were cancelled for failure to construct over two years ago. Not only was Chadmoore not the licensee of these stations³, but the Commission's determination that Roberts failed to rejustify its EI authority was final more than two years ago.

Roberts made its rejustifcation filing in June 1996.⁴ However, upon review by the Commission, the Roberts EI period was not rejustified because the Commission found that Roberts had shown nothing to demonstrate why

² Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, Implementation of Sections 3(n) and 322 of the Communications Act – Regulatory Treatment of Mobile Services, Implementation of Section 309(f) of the Communications Act – Competitive Bidding, First Report and Order, Eighth Report and Order and Second Further Notice of Proposed Rulemaking, 11 FCC Rcd 1463 (1995) (the "800 MHz SMR Report and Order"). The FCC's decision to deny Chadmoore's request was upheld by the D.C. Court of Appeals in Chadmoore Communications, Inc. v. FCC, 113 F.3d 235 (D.C. Cir. 1997).

³ Chadmoore seeks reinstatement of SMR licenses formally held by a group of 33 separate licensees who were represented by Stephen K. Roberts (the "Roberts License Group"). Apparently, Chadmoore managed the stations and/or was supposed to assist in their construction.

⁴ On March 3, 1995, the Commission granted Roberts an EI period of five years. However, the extended period was granted "**conditionally** on the outcome of the Further Notice of Proposed Rule Making, PR Docket No. 93-144." See letter from Michael J. Regiec, Deputy Chief, Land Mobile Branch to K. Steven Roberts on March 3, 1995 (emphasis in original). Thus, Roberts was on notice that its EI authority could be limited within the context of the FCC's then-ongoing rulemaking concerning wide-area and upper-200 SMR channel auction licensing

it should receive additional time in which to construct its facilities.⁵ Accordingly, Roberts was denied continued EI authority and was permitted six months to construct its licenses. Roberts sought reconsideration and the Commission affirmed its decision.⁶ Roberts did not contest the matter further and approximately 500 Roberts licenses cancelled for failure to construct on November 20, 1997.

During this time period, the Commission was also considering whether EI licensees should have the same construction flexibility as Economic Area ("EA") licensees. By Memorandum Opinion and Order, the Commission upheld its distinction between EA licensees and EI licensees, ruling that different construction requirements would apply. Southern Company appealed this decision to the United States Court of Appeals for the District of Columbia.

⁵ The Commission noted that the Roberts Group had not ordered equipment for build-out of their proposed system and no stations were constructed despite having held a significant portion of their licenses for years. See para. 22 in Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, PR Docket No. 93-144, Implementation of Sections 3(n) and 322 of the Communications Act – Regulatory Treatment of Mobile Services, GN Docket No. 93-252, Implementation of Section 309(f) of the Communications Act – Competitive Bidding, PP Docket No. 93-253, Order, 13 FCC Rcd 1533 (WTB 1997) (the "Rejustification Order").

⁶ Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, PR Docket No. 93-144, Implementation of Sections 3(n) and 322 of the Communications Act – Regulatory Treatment of Mobile Services, GN Docket No. 93-252, Implementation of Section 309(f) of the Communications Act – Competitive Bidding, PP Docket No. 93-253, Memorandum Opinion and Order, 12 FCC Rcd 18349 (WTB 1997).

On February 5, 1999, the Court of Appeals found that the Commission had not adequately explained its distinction between EA and E1 licensees concerning construction benchmarks and remanded the proceeding to the Commission.⁷ In light of this decision, the Wireless Telecommunications Bureau (the "Bureau") issued a Public Notice which temporarily suspended the construction timetable for "incumbent. . .SMR licensees that are part of a wide-area system and that were granted extended implementation authority pursuant to the Bureau's approval of their rejustification showings."⁸ On May 21, 1999, the Commission solicited comment on the construction requirements for "incumbent wide-area licensees."⁹ Six parties filed comments, including Chadmoore.

Chadmoore argued that the Commission should extend EA construction requirements retroactively to *any* 800 MHz SMR incumbent

⁷ Fresno Mobile Radio, Inc. v. FCC, 165 F.3d 965 (D.C. Cir. 1999) (the "Fresno Court Decision").

⁸ Wireless Telecommunications Bureau Temporarily Suspends Construction Timetable for Wide Area 800 MHz SMR Licensees Due to Court Remand, Public Notice, DA 99-698 (April 15, 1999). Because the Roberts licenses had expired, it was not entitled to this relief, as discussed below

⁹ Wireless Telecommunications Bureau Requests Comment on the Construction Requirements for Commercial Wide-Area 800 MHz Licensees Pursuant to Fresno Mobile Radio, Inc. v. FCC, Public Notice, DA 99-974 (May 21, 1999).

licensee that had ever sought EI authority, whether it was granted or not.¹⁰

Both Nextel and Southern Company opposed Chadmoore's request.

On remand, the Commission decided to allow "incumbent wide-area licenses" the option of complying with site-by-site construction requirements or make a showing that they have met the construction benchmarks of EA licensees.¹¹ Addressing Chadmoore's comments, the Commission specifically decided to grant the option of meeting the EA construction benchmarks only to those licensees that "have been granted extended implementation and were within their construction periods at the time of the Fresno decision" (i.e, February 5, 1999). The Commission determined that to apply the EA construction requirements retroactively to all licensees would require reinstatement of licenses that had expired for failure to construct more than two years ago, that these licensees had a full opportunity to construct their licenses, and that it would adversely impact existing EA licensees and future EA licensees in the upcoming Lower 230 channel auction.¹²

¹⁰ Specifically, Chadmoore requested reinstatement of the Roberts License Group licenses and its own licenses that were cancelled due to the denial of its own EI request.

¹¹ Fresno Remand Order at para. 12.

¹² Fresno Remand Order at para. 19. In other words, the Fresno Remand Order did not require such a result, but only that the Commission reexamine whether it properly justified different construction requirements for rejustified EI and EA licensees.

On January 24, 2000 Chadmoore filed the instant Petition, once again requesting reinstatement of the Roberts licenses. Chadmoore continued to argue that any former EI licensee (even if its licenses have been cancelled) should be granted a choice of meeting the alternative construction benchmarks.

As detailed below, Chadmoore's Petition should be dismissed because (1) Chadmoore lacks standing to request relief for the Roberts licenses; (2) it seeks untimely reconsideration of the Commission's Rejustification Order from November 1997; and (3) it seeks reconsideration of an issue that was not even addressed by the Fresno Court and has already been fully addressed by the Commission.

II. CHADMOORE LACKS STANDING TO REQUEST RELIEF

Chadmoore lacks standing to bring the instant Petition. Rebuffed in its previous attempts to resuscitate its own four-year old dismissed extended implementation filing, Chadmoore now requests reinstatement of hundreds of licenses formally held by other licensees.

Chadmoore provides absolutely no legal authority for its standing to request reinstatement on behalf of Roberts.¹³ Commission and court precedent clearly prohibit such a request. In the Goodman/Chan proceeding, the Commission found that the Receiver had no standing to request relief on

¹³ Chadmoore declared itself the "system manager" for Roberts. Chadmoore Petition at page 5.

behalf of the 2500 Goodman/Chan licensees.¹⁴ This was later affirmed by the United States Court of Appeals for the District of Columbia Circuit.¹⁵ The Commission should dismiss the instant Petition because Chadmoore has no standing to request reinstatement on behalf Roberts.

III. CHADMOORE'S PETITION SHOULD BE DISMISSED AS AN UNTIMELY PETITION FOR RECONSIDERATION OF THE COMMISSION'S REJUSTIFICATION ORDERS

Not only does Chadmoore lack standing to request reinstatement of 500 licenses that were formally held by other licensees, but the Petition is over two and one-half years too late. As described above, on November 12, 1997 the Commission denied the Roberts petition for reconsideration of the May 20, 1997 Rejustification Order, which permitted Roberts until November 20, 1997 to complete construction of its SMR facilities. The Commission clearly stated that any unconstructed licenses not constructed by the applicable construction deadline would cancel automatically.

The Roberts participation in this proceeding ended in November 1997 when it chose to file no further appeals and let those licenses it chose not to construct automatically cancel. The instant Petition, therefore, is an untimely petition for reconsideration of the Commission's decision to

¹⁴ Daniel R. Goodman, Receiver; Dr. Robert Chan, Petition for Waiver of Sections 90.633(c) and 1.1102 of the Commission's Rules, Memorandum Opinion and Order and Order on Reconsideration, 13 FCC Rcd 21944 (1998) ("Goodman/Chan Order").

¹⁵ Daniel R. Goodman, Solely in his Capacity as Receiver, Chadmoore Wireless Group, Inc. and SMR Services, Inc., et al, v. Federal Communications Commission, 182 F.3d 987 (D.C. Cir. 1999).

truncate the Roberts construction period and cancellation of those licenses which went unconstructed by November 1997. The Commission's Rules clearly state that pursuant to Section 405 of the Communications Act and Section 1.106 of the Commission's Rules, petitions for reconsideration must be filed within 30 days from the date of public notice of the final Commission action.¹⁶ In a recent case involving an EI licensee who filed its petition for reconsideration ten months after its EI deadline had expired, the Commission dismissed the petition as untimely.¹⁷ The Commission should similarly dismiss Chadmoore's untimely Petition.

IV. CHADMOORE'S ARGUMENTS LACK MERIT AND SHOULD BE REJECTED

Even if Chadmoore could overcome the procedural hurdles it faces as a result of its lack of standing and untimeliness, the Commission should dismiss Chadmoore's Petition because it raises no new issues for Commission review.

First, as described above, Chadmoore specifically raised its request for reinstatement of its own licenses and the Roberts licenses during the Fresno Remand Order proceeding. The Commission specifically rejected these

¹⁶ 47 C.F.R. § 1.106.

¹⁷ See New England Wireless Partners, Extended Implementation for Licenses Participating in Wide-Area 800 MHz SMR System, Order, _____ FCC Rcd ___, DA 99-3024 (1999) ("NEWP Decision").

arguments.¹⁸ Therefore, the Commission should dismiss Chadmoore's Petition, which contains no new facts or points of law, as repetitious under Section 1.106 of the Commission's Rules.¹⁹

Second, the fundamental aspect of the Fresno Court Decision and the Fresno Remand Order proceeding was the applicable construction requirements for EI licensees vis-à-vis EA licensees. Since the licensees at issue were denied extended implementation in the rejustification proceeding, they fall outside the class of licenses subject to relief hereto.

V. CONCLUSION

Chadmoore lacks standing; has filed its Petition over two years after the applicable licenses cancelled for failure to construct and raises no new issues that were not closely examined by the Commission and dismissed

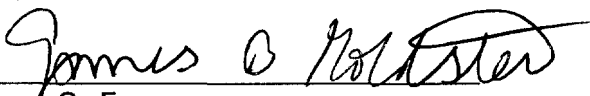
¹⁸ Fresno Remand Order at para. 19.

¹⁹ Even were the Commission to consider Chadmoore's argument that the Commission's Fresno Remand Order has somehow treated Roberts disparately vis-à-vis other SMR providers, that is not the case. Roberts was treated exactly the same as other SMR licensees. Roberts had an opportunity to apply for EI authority and was temporarily granted it, just like other SMR licensees. Roberts had an opportunity to construct its licenses just like other SMR licensees, but failed to do so. Roberts had an opportunity and did file a rejustification showing, just like other SMR licensees. The Commission determined, as long ago as May 1997, that Roberts did not demonstrate that it had met its burden of rejustification – as some other licensees failed to do. The Commission also gave Roberts six more months to construct its licenses, just as it did for other licensees in the proceeding. As this shows, Roberts was treated identically as other SMR licensees and the Commission was correct to deny Chadmoore (and Roberts) any further relief in the Fresno Remand Order.

months ago. Therefore, the Commission should dismiss Chadmoore's Petition.

Respectfully submitted,

NEXTEL COMMUNICATIONS, INC.


Robert S. Foosaner
Senior Vice President
and Chief Regulatory Officer

Lawrence R. Krevor
Senior Director – Government Affairs

James B. Goldstein
Regulatory Attorney – Government Affairs

2001 Edmund Halley Drive
Reston, VA 20191
(703) 433-4141

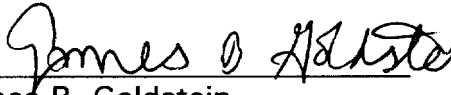
April 24, 2000

CERTIFICATE OF SERVICE

I, James B. Goldstein, hereby certify that on this April 24, 2000, caused a copy of the attached Opposition of Nextel Communications, Inc. to be served by first class mail to the following:

Office of the Secretary *
Federal Communications Commission
TW-A325
445 12th Street, SW
Washington, DC 20554

Tara S. Becht, Esquire
Irwin, Campbell & Tannenwald, P.C.
1720 Rhode Island Avenue, NW
Suite 200
Washington, DC 20036-3101


James B. Goldstein

* Via hand delivery